

JAPAN

Virtual Arbitration Hearings – the Future is Now

Dr Lars Markert
Nishimura & Asahi
Tokyo

Since its outbreak in December 2019, the world has been battling the COVID-19 pandemic and its impact on global health, economy and society. After months of lockdowns and emergency declarations in numerous countries, both the public and private sectors are implementing measures to restore social and economic functions, including access to justice. Local courts and arbitral institutions in many jurisdictions are developing alternative ways of dispute resolution whilst in-person services and hearings are slow to resume. The trend seems to be moving towards “contactless” trials and arbitrations via electronic filings and virtual hearings. This contribution will highlight some of the latest developments with respect to virtual arbitration hearings.

Litigation and court practice

Amidst the near standstill of the judiciary, local courts in several countries have been resuming operations and opening up to virtual proceedings. Despite efforts and progress in various jurisdictions, including for example Japan, virtual trials are still far from becoming regular court practice. Local courts are often not equipped with the necessary technology to go entirely virtual. But even where they are, courts still face substantial technical challenges as well as security and transparency issues. Nevertheless, there is hardly an argument that virtual hearings are not a proper form of “oral hearings” – an issue relevant to parallel developments in international arbitration.

Arbitral practice

International arbitration is known for several key advantages over domestic litigation, including procedural flexibility, a neutral forum, and near global enforceability of awards. The ongoing pandemic has yet again highlighted the arbitral community’s ability to swiftly react to new challenges. In the face of COVID-19, several major arbitral institutions have pledged to collaborate to ensure that parties have their cases heard without undue delay.¹ To assist users and practitioners in the field, many arbitral institutions are equipping themselves with the necessary technology to allow electronic submissions and to conduct meetings or hearings via videoconference.² Moreover, many institutions have published their own guidelines on virtual arbitrations and are holding numerous webinars on the topic.



Response by arbitral institutions

One of the first initiatives to be finalized was the Seoul Protocol on Video Conferencing in International Arbitration of March 2020. It is promoted by KCAB International and the Seoul IDRC. Also in March 2020, the Japan International Dispute Resolution Center (JIDRC) opened its Tokyo branch and was quick to upgrade technology and protocols to conduct virtual hearings out of Japan’s first fully dedicated arbitral hearing center. Arbitral institutions such as the ICC and AAA-ICDR, as well as organizations such as CIArb, Delos Dispute Resolution and the African Arbitration Academy have developed

helpful notes and checklists. To make up for the sudden cancellation of in-person arbitration seminars, a whole range of online trainings and events have emerged. Some arbitral institutions, such as SIAC, AIAC and the SCC, were quick to set up regular webinar series. This has led to a novel situation for busy practitioners: previously, their grumbling about too many arbitration conferences was mainly anecdotal as nobody actually had the time and money to attend them all. Suddenly, practitioners are spoilt for choice and are forced to carefully balance numerous webinars against their competing work commitments.

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In terms of accessibility, the pandemic has accelerated the shift to the all-electronic filings and document databases that several institutions had been pursuing for some time. A variety of institutional rules already expressly allow electronic submissions, for example the JCAA, DIS, SIAC and HKIAC. More integrated services include arrangements for virtual hearings currently provided by arbitral institutions in conjunction with dedicated hearing centers. Institutions and organizations generally offer support, but users are often left to rely on standard videoconferencing platforms such as Zoom, WebEx, Microsoft Teams or Skype. By contrast, professional hearing or transcription platform providers have started to offer customized options for arbitral hearings, albeit at premium costs.

Possible limitations to virtual hearings

Despite the wide support from arbitral institutions, questions arise as to what options exist if a disputing party objects to a virtual hearing. A disagreement between the parties calls for the tribunal's exercise of procedural discretion. Thus, tribunals will have to decide the issue on a case-by-case basis, considering all relevant circumstances. This includes a tribunal's duty to conduct the arbitration expeditiously, to give due regard to limitations to virtual proceedings in the applicable institutional rules and mandatory laws at the seat of the arbitration, and to ensure that any ensuing award will be enforceable. Most importantly, virtual hearings have to maintain the basic tenets of international arbitration, i.e. equal treatment of the parties and right to be heard. A tribunal has to be confident that these can be preserved as a legal and technical matter before deciding to conduct a virtual hearing over the objection of one of the parties.

Most institutional rules only permit the use of video-conferencing explicitly for case management conferences and emergency or expedited procedures.³ As an exception, the JCAA Commercial Arbitration Rules and LCIA Rules allow tribunals to select the appropriate means for holding a hearing, including by video.⁴ The UNCITRAL Rules and AAA Rules foresee that witness examinations and presentations of evidence may be conducted by alternative means, including video.⁵

At the same time, the arbitration rules of leading arbitral institutions grant tribunals a broad discretion to conduct proceedings as long as they are fair, expeditious and effective. Such provisions could be understood as implicitly envisaging virtual hearings. It remains to be seen whether arbitral awards rendered after virtual hearings will withstand applications for set-aside or for denial of enforcement on the grounds that a tribunal breached due process, public policy or mandatory law at the seat of the arbitration. In light of the develop-

ments in domestic litigation, it would appear that courts will become more and more open to the notion that hearings can proceed without the parties' physical presence.

Outlook

Virtual dispute resolution is still in its infancy and far from unanimously accepted. Some will argue that the practical and legal uncertainties outweigh the benefits of virtual hearings. In-person attendance of hearings no doubt simplifies coordination for parties and tribunals. Anyone who has conducted virtual hearings involving multiple disparate time zones can attest that they can be very tiring, leaving aside the usual "screen fatigue" that will set in if the hearing schedule does not provide for sufficient breaks. Moreover, solutions to looming (cyber-)security and confidentiality risks are yet to be fully explored. From a practical perspective, certainly only enforceable arbitral awards will help a party to obtain justice and monetary satisfaction.

Nevertheless, as with many things involving technology, it can be expected that most of the technical teething problems of virtual hearings will soon be resolved or at least significantly improved. Arbitrators and parties are smartening up by conducting technical test runs, adjusting hearing schedules and drafting virtual hearing protocols and procedural orders that ensure everything runs smoothly – and where it does not, that appropriate safeguards are put in place. Apart from it being ecologically friendly if arbitrators, counsel teams, as well as witnesses and experts conduct virtual hearings from their offices or homes instead of flying around the globe, virtual hearings improve arbitral efficiency. It has become much easier and more accepted to meet virtually, in particular for case management conferences, pre-hearing discussions or discrete procedural disputes. It is suggested that virtual meetings for these kind of issues facilitate discussions and negotiation of solutions – and are therefore here to stay. When it comes to evidentiary hearings, the future is more unpredictable. Larger and more complex cases will likely return to physical hearings, to avoid time zone issues and to allow for a more condensed hearing schedule. By contrast, the efficiency gains and cost savings connected to virtual hearings may be of particular relevance for smaller cases of lesser value, and online meetings could become the "new normal". Considering that these cases are often handled by "younger" arbitrators, it constitutes a welcome chance for them to showcase not only arbitral skills but also technical prowess – virtually opening a door for a new generation of arbitration practitioners to develop and further this new facet of the ever-evolving international arbitration regime.

1. Arbitral institutions COVID-19 joint statement: <https://iccwbo.org/content/uploads/sites/3/2020/04/covid19-joint-statement.pdf>.

2. For an in-depth introduction, see Markert/Burghardt, *Navigating the Digital Maze – Pertinent Issues in E-Arbitration*, 2017 *Journal of Arbitration Studies* 27(3), pp. 3-31.

3. Article 4(2) and Appendix IV 2017 ICC Rules; Schedule 1 2016 SIAC Rules; Article 28(2) 2017 SCC Rules; Article 6(3) and Article E-9 2014 IDRC Rules, Article R-38(d) and Article P-2(a)(xiv)(a) AAA Rules.

4. Article 50(3) 2019 JCAA Commercial Arbitration Rules ("Where the hearings are to be held, the arbitral tribunal should select appropriate means for holding a hearing, including by video conference or other methods"); Article 19.2 LCIA Rules (2020) and Article 6.4 para. 33 Guidance Notes for Arbitrators.

5. Article R-32(c) AAA Rules; Article 28(4) 2010 UNCITRAL Rules.